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KONSORTIUM JARINGAN SELANGOR SDN BHD v. PROJEK LINTASAN SUNGAI BESI-ULU KLANG SDN BHD

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK JC
[SUIT NO: BA-22NCVC-651-12-2018]
29 MAY 2020

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LAND LAW: *License – Forest reserved land – Use permit – Use permit granted to plaintiff under National Forestry Act 1984 to erect telecommunications tower – Revocation of use permit – Demolition of tower by defendant – Whether unlawful and amounted to breach of s. 235 of Communications and Multimedia Act 1998 – Locus standi – Whether plaintiff had cause of action or right to claim compensation for demolition of tower – Communications and Multimedia Act 1998, ss. 126, 271 – Federal Constitution, art. 13*

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CIVIL PROCEDURE: *Summary disposal – Application for – Whether suit found to be appropriate and suitable for O. 14A disposal by determination of question of law – Whether question of law suitable for summary disposal – Whether question of law would dispose whole or substantial part of suit – Rules of Court 2012, O. 14A*

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The plaintiff was granted a use permit ('use permit') under the National Forestry Act 1984 ('NFA') in respect of Compartment 82, Bukit Sungai Puteh Forest Reserve ('land'). The plaintiff then erected a telecommunications transmitter station and tower ('tower') on the land. The tower was installed by the plaintiff pursuant to valid licenses held under the Communications and Multimedia Act 1998 ('CMA') at all material times, and the tower constituted a network facility within the meaning of the CMA. The terms of the use permit stated, *inter alia*, that the use permit could be revoked by the Forestry Department at any time, and the plaintiff shall have no claim for any damages or compensation for such revocation. The plaintiff wrote to the defendant to discuss the relocation of the tower to a different position within the right of way of the proposed expressway which expressway would take up part of the reserved forest. The plaintiff's use permit was renewed annually up to 31 December 2017. On 18 May 2018, the State Director of Forestry issued a letter to revoke the use permit. The State Forestry's Department ('Department') gave the plaintiff a further period to remove the latter's movable property. Until to-date, no application for judicial review or any suit had been filed by the plaintiff against the State Director of Forestry or any Government authority in connection with or arising from the revocation of the use permit nor to challenge or impugn the State Director of Forestry's revocation letter dated 18 May 2018. The defendant produced photographs of various telecommunication companies' workers dismantling the respective companies' facilities and telecommunication equipment from the tower in December 2018. The tower was demolished by the defendant in January 2019. The plaintiff commenced this suit against the defendant,

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claiming for, *inter alia* (i) a declaration that the destruction of the tower by the defendant was unlawful; (ii) a declaration that the destruction of the tower or any part thereof by the defendant amounted to a breach of s. 235 of the CMA; and (iii) damages. By encl. 18, the defendant made an application under O. 14A of the Rules of Court 2012 for the determination of the following question of law for disposal of the suit without the full trial of this suit: whether the plaintiff has a cause of action and/or the right to claim compensation for the demolition of the subject matter telecommunications tower erected on forest reserved land, in view of the effect under the law – particularly the NFA 1984 – of a use permit that had lapsed and/or been cancelled. In opposing the O. 14A application, the plaintiff contended that: (i) the factual basis for the said question was seriously disputed in that the material facts relating to the subject matter were disputed; and (ii) the said question would not dispose of a substantial part of the action and therefore would not result in any saving in costs and time.

Held (dismissing plaintiff's action with costs):

(1) After considering the affidavits and submissions of the parties, the present suit was found to be appropriate and suitable for a O. 14A disposal by determination of the said question of law. An answer to the said question of law would dispose of either the whole or a substantial part of this suit and could result in the saving of costs and time. (para 22)

(2) Under the law of property, any suit or action to claim against person for damages for destruction or demolition of an immovable property can only be instituted and maintained by the prevailing owner of the immovable property at the time of the destruction or demolition, and not by the previous owners who had ceased to have ownership right or claim to the immovable property prior to the date of destruction or demolition. (para 42)

(3) The plaintiff's last use permit expired on 1 January 2018. Under s. 27 of the NFA, read with the National Forestry Act (Adoption) Enactment 1985, all immovable property at the land vested in the State Authority as from 1 January 2018, and the permit holder had 90 days within which to remove its movable properties, failing which the Director of Forestry Department could dispose of them in whatever manner he thinks fits and may recover from the previous permit holder the expenses of such disposal. Many months before the expiry of the use permit, the plaintiff already knew of the ongoing process of the preparation for use of the relevant parts of the permanent reserved forest for the purposes of construction and operation of a privatised expressway. As early as 27 September 2016, the plaintiff wrote a letter to the defendant regarding the proposed new site for the relocation of the

telecommunication tower within the right of way of the expressway. The plaintiff did not remove the telecommunication tower or the equipment by the end of the 90-day period after the expiry of the last use permit, neither did it dismantle or remove the telecommunication tower or equipment from the site within 90 days of the letter dated 18 May 2018 sent by the State Director of Forestry. There was no valid basis for the plaintiff to complain about the deprivation of reasonable opportunity for the plaintiff to dismantle and remove the tower from the site. (paras 28-32 & 48)

(4) As the NFA does not have a specific definition for 'building' but uses a term 'building' in s. 17(1), in contrast with the term 'movable properties' in s. 39, the word 'building' in s. 17(1) is used synonymously with 'immovable property' under the law of property or 'land' as defined in the National Land Code ('NLC'). Under the NLC and law of property, immovable properties form part of the land, and the landowner also has ownership of the immovable properties at the land. Section 17(1) of the NFA also stipulates to the same effect that all buildings (synonymous with immovable properties) at the forest reserved land are vested in the State Authority upon the determination or expiry of any licence, minor licence or use permit. In the circumstances, the ownership of the tower vested in the State Authority as from 1 January 2018. With the vesting of the tower in the State Authority on 1 January 2018, the plaintiff ceased to have any ownership claim or right to the tower as from 1 January 2018. The plaintiff thus had no *locus standi* to sue another person who subsequently demolished and dismantled the tower in January 2019. (paras 38 & 40-42)

(5) The NFA expressly forbids any person from occupying or carrying out any activity at any forest reserved land, unless the person holds a use permit: (s. 32). More significantly, upon the lapse or expiry of the use permit on 1 August 2018, the plaintiff lost its licence to occupy and carry out any activity on the site. Indeed, pursuant to the clear provisions of the NFA, the plaintiff was expressly forbidden from continuing to occupy the site after the lapse date. There was therefore no expectation of continued possession or undisturbed enjoyment to the site after 1 January 2018. Moreover, the tower – based upon which the plaintiff may have attempted to argue possession of the site – had vested in the State Authority as from 1 January 2018. As a consequence of the above, at the time of the tower's demolition, the plaintiff had no licence to occupy the site and no ownership of the tower. As such, the plaintiff had no *locus standi* or legal right to maintain the present suit for the value of the tower or the loss of alleged incomes to be derived from the use of the tower at the site. (para 54)

(6) Section 235 of the CMA merely protects the network facilities from wrongful acts or omissions which have the effect of altering or tampering with the network facilities so as to operate them in a manner or extent unauthorised by the Commission and also from wrongful acts of mischief which have the effect of destroying, damaging or interfering with the lawful operation of the network facilities. Implicit in s. 235 of the CMA is that the network facilities have been duly licensed by the Commission and are lawfully erected and continued at the land with the consent or agreement of the landowner. It is not the intent or purpose of s. 235 to deprive any landowner of his/her proprietary rights after the expiry of the lease, tenancy or permit previously granted to the network provider who erected the network facilities on the landowner's land. Similarly, s. 235 is not intended to empower the network provider to compel a landowner to let the network provider continue to use the land for operating the network facilities without the landowner's consent or agreement after the expiry of the previous lease, tenancy or licence or permit. There were no express words in s. 235 of the CMA which could be interpreted to that effect according to their natural and ordinary meaning. (para 63)

(7) Interpreting ss. 126, 235 and 271 of the CMA, in light of art. 13 of the Federal Constitution, this court held that (i) where a telecommunication network provider has rented or been given licence to use a land for building or operating a telecommunication tower (*ie,* network facility) for a fixed period of time, then after the telecommunication tower has been erected the landlord or the proprietor may thereafter demolish or remove the tower after lapse of reasonable time from the date of expiry of the tenancy or licence and after giving reasonable notice to the telecommunication network provider and other interested persons; (ii) where a telecommunication tower has been built on a land which has been rented or granted licence to a telecommunication network provider, thereafter the ownership of the telecommunication tower built on the land cannot forever remain with the licensed telecommunication network provider who built it notwithstanding the expiry of the tenancy or licence; (iii) where the telecommunication tower was erected on a permanent reserve forest land pursuant to a use permit issued under the NFA or the State Enactment which adapted the 1984 Act, the telecommunication tower, if it constitutes building or immovable property, vests in the State Authority upon the expiry of the use permit (s. 17) or if the tower constitutes a movable property, it remains the movable property of the network provider who is also under a statutory duty to remove the same within 90 days from the date of the expiry of the use permit, failing which the movable property would be disposed of by the State Director of Forestry or any person acting on his behalf or by a person who, after the expiry of the use permit, takes over the possession of the relevant land (s. 39). (para 65)

(8) The plaintiff had not filed any judicial review proceeding to challenge the validity of the State Director of the Forestry's revocation of the use permit with effect from 1 January 2018. Neither had the plaintiff include the State Director of Forestry as a party to this suit nor made any allegation to question the validity of revocation of the use permit. A person could not mount a collateral attack against the validity of a public officer's exercise of a statutory powers by way of an ordinary civil suit, and such attack or challenge had to be by way of a judicial review proceeding which included the relevant public officer as a party. Any collateral attack or circuitous attempt to challenge the validity of a public officer's decision would constitute an abuse of process and was therefore liable to be struck out by the court. In the circumstances, this court had to consider the said question of law on the basis that the director's revocation of the use permit was valid and lawful. (para 36)

(9) The plaintiff had no cause of action or the right to claim compensation for the demolition of the telecommunications tower erected on the forest reserved land, in view of the effect under the law – particularly the NFA 1984 – of a use permit that had lapsed and/or been cancelled. The question of law posed herein was answered in the negative. (para 67)

Case(s) referred to:

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Caristra Holdings Sdn Bhd v. Projek Lintasan Sungai Besi-Ulu Klang Sdn Bhd (Suit No BA-22NCvC-575-11-2018) (Unreported) ***(refd)***

Director Of Forests, Sarawak & Anor v. Racha Urud & Ors And Other Appeals [2017] 5 CLJ 389 FC ***(refd)***

Govindaraju v. Krishnan [1962] 1 LNS 46 HC ***(refd)***

Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd & Other Appeals [2014] 7 CLJ 597 FC ***(refd)***

Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626 CA ***(refd)***

Low Chee & Sons Sdn Bhd & Anor v. Extreme System Sdn Bhd & Another Appeal [2011] 1 LNS 1944 CA ***(refd)***

Majlis Bandaraya Shah Alam v. Only One Foot Reflexology Sdn Bhd [2017] 7 CLJ 557 CA ***(dist)***

MHM Trend Station Sdn Bhd & Ors v. Petronas Dagangan Bhd [2009] 1 LNS 437 CA ***(dist)***

Mohamed Said v. Fatimah [1962] 1 LNS 101 HC ***(refd)***

Nicholls v. Ely Beet Sugar Factory [1931] 2 Ch 84 ***(refd)***

O'Reilly v. Mackman [1983] 2 AC 237 ***(refd)***

Papoo v. Veeriah [1959] 1 LNS 70 HC ***(refd)***

Peacock v. Custins [2002] 1 WLR 1815 ***(refd)***

SME Aerospace Sdn Bhd v. Steyr Mannlicher (M) Sdn Bhd [2006] 5 CLJ 121 HC ***(refd)***

Visage Continental Sdn Bhd v. Smooth Track Sdn Bhd [2007] 6 CLJ 570 CA ***(refd)***

Wan Shahriman Wan Suleiman v. Esso Malaysia Bhd [2011] 1 LNS 1173 HC ***(refd)***

Wong See Kui v. Hong Hin Tin Mining Company [1969] 1 LNS 202 HC ***(refd)***

Legislation referred to:
Communications and Multimedia Act 1998, ss. 126, 235, 271
Electricity Supply Act 1990, ss. 13, 16, 37(1), (2), (11)(b)
Federal Constitution, arts. 4(1), 13(2)
National Forestry Act 1984, ss. 17(1), 27, 39
Rules of Court 2012, O. 14, O. 14A r. 1(1), O. 18 r. 19
Specific Relief Act 1950, ss. 7(2), 8(1)
Water Services Industry Act 2006, ss. 125, 141

For the plaintiff - WT Low & Ng Seng Yi; M/s Weng & Co
For the defendant - Vatsala Ratnasabapathy & Dennis HK Khong; M/s Zain & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Tee Geok Hock JC:

Background Facts

[1] In or about 2007, the plaintiff was granted a use permit ("use permit") under the National Forestry Act 1984 ("NFA") in respect of Compartment 82, Bukit Sungai Puteh Forest Reserve ("the land"). The plaintiff then erected a telecommunications transmitter station and tower ("tower") on the land. The tower was installed by the plaintiff pursuant to valid licenses held under the Communications and Multimedia Act 1998 ("CMA") and at all material times, the tower constitutes a network facility within the meaning of the CMA. (See para. 6.1 of the defendant's first affidavit, paras. 10.2 to 10.3 of the plaintiff's first affidavit, para. 7.2 of the plaintiff's second affidavit, a copy of a use permit dated 22 November 2007 in exh. AF2 and a copy of a plaintiff's network facilities licence on exh. AF3). (See also paras. 1 and 2 of the statement of agreed facts (encl. 47)).

[2] The terms of the use permit stated *inter alia* that the use permit can be revoked by the Forestry Department at any time, and the plaintiff shall have no claim for any damages or compensation for such revocation: see paras. (q) and (r) in lampiran 1 of the Forestry Department's letter dated 22 November 2007 which issued the use permit: exh. AF2 to the plaintiff's affidavit-in-reply (encl. 20).

[3] In September 2016, the plaintiff wrote to the defendant to discuss the relocation of the tower to a different position within the right of way of the proposed expressway which expressway would take up part of the reserved forest.

[4] The plaintiff's use permit was renewed annually up to 31 December 2017 (exh. FZ1; para. 3 of the statement of agreed facts, encl. 47). The State Director of Forestry issued a letter dated 18 May 2018 to revoke the use permit. (See paras. 6.2 to 6.3 of the defendant's first affidavit, para. 10.1 of the plaintiff's first affidavit, para. 5.1 of the plaintiff's second affidavit, a

A copy of a letter dated 9 March 2017 issued by the State Director of Forestry to renew the use permit in exh. FZ1 and a copy of revocation letter dated 18 May 2018 issued by the State Director of Forestry in exh. FZ4).

[5] The last of the defendant's use permit was until 31 December 2017: see exh. FZ1 in the defendant's affidavit-in-support (encl. 19); para. 4 of the B statement of agreed facts (encl. 47). By the State Forestry Department's letter dated 18 May 2018, the Department gave the plaintiff a further period to remove the latter's movable property (if any) from the site: para. 5 of the statement of agreed facts. The exact relevant words used in the Forestry Department's letter were "… pihak tuan dikehendaki mengambil tindakan C segera untuk mengalihkan apa-apa harta alih yang dimiliki oleh pihak tuan dari kawasan tersebut dalam tempoh 90 hari dari tarikh surat ini dikeluarkan …".

[6] Until to-date, no application for judicial review or any suit has been filed by the plaintiff against the State Director of Forestry or any D Government authority in connection with or arising from the revocation of the use permit nor to challenge or impugn the State Director of Forestry's revocation letter dated 18 May 2018.

[7] In exh. FZ6 to the defendant's affidavit-in-reply (encl. 21), the defendant produced photographs of various telecommunication companies' E workers dismantling the respective companies' facilities and telecommunication equipment from the tower in December 2018.

[8] In December 2018 and January 2019, the defendant's workers dismantled and removed the tower from the said land: para. 21 of the F amended statement of claim and para. 8.2 of statement of defence and counterclaim para. 12.2.3(c) of the defendant's affidavit-in-support (encl. 19). The tower was demolished by the defendant in January 2019: para. 6 of the statement of agreed facts.

[9] In December 2018, the plaintiff commenced this suit against the G defendant.

[10] In this suit, the plaintiff claims for the following reliefs:

(a) a declaration that the destruction of the Tower by the Defendant is and was unlawful;

H (b) a declaration that the destruction of the Tower or any part thereof by the defendant (whether by itself or through its servants and/or agents) amounts to a breach of s. 235 of the Communications and Multimedia Act 1998;

(c) special damages in the amount of RM6,927,005.01;

I (d) aggravated damages in the amount RM1,000,000.00.

(e) exemplary damages in the amount RM1,000,000.00.

(f) an order that the defendant do forthwith pay damages to the Plaintiff for any and all losses incurred by the Plaintiff as result of any removal, disposal, damage, destruction to or interference with the destruction of the Tower or any part thereof, upon such damages having been assessed by this Honourable Court.

(g) pre-judgment and post-judgment interest on the damages awarded by this Honourable Court.

(h) costs; and

(i) any further or other relief as this Honourable Court deems fit and just.

[11] By encl. 18 the defendant makes an application under O. 14A of the Rules of Court 2012 ("ROC 2012") seeking this court's determination of the following question of law for disposal of the suit:

> Whether the Plaintiff has a cause of action and/or the right to claim compensation for the demolition of the subject matter telecommunications tower erected on forest reserved land, in view of the effect under the law – particularly the National Forestry Law 1984 – of a use permit that has lapsed and/or been cancelled.

[12] Pursuant to the defendant's applications in encl. 29, this court on 10 January 2020 granted leave to the defendant to file and serve a further affidavit-in-support of the defendant's O. 14A application in encl. 18, and that the defendant's affidavit-in-support affirmed in 31 January 2020 (encl. 30) in support of the O. 14A application be deemed as the further affidavit. There is no appeal against this court's leave decision dated 10 January 2020.

Legal Principles On O. 14A

[13] In *Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd & Other Appeals* [2014] 7 CLJ 597; [2014] 6 MLJ 31 the Federal Court made the following important observations at paras. [29] and [36]:

> [29] … it is clear that the position of the law in an O. 14A application is that where there are serious disputes of facts involved, it is inappropriate and unsuitable to have recourse to an O. 14A procedure …
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> …
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> [36] It is well settled that an issue is only suitable for determination under O. 14A if the points of law to be determined thereunder have been stated in clear and precise terms and the facts disclosed by the pleadings and affidavit evidences are sufficient for the court to make such determination which would be final as to the entire cause or matter (see *Allen v. Gulf Oil Refining Ltd* [1980] QB 156 and *Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd* [2008] 2 CLJ 686).

[14] The Court of Appeal in *Low Chee & Sons Sdn Bhd & Anor v. Extreme System Sdn Bhd & Another Appeal* [2011] 1 LNS 1944; [2013] 1 MLJ 650 made the following observations (at para. [15]):

> [15] We are in agreement with learned counsel for the respondent, that based on the facts and of the present case O. 14A application in not suitable on the following grounds:
>
> (a) for an O. 14A to be invoked, all material facts relating to the subject matter in the claim must be undisputed or admitted. The Court should not give ruling under O. 14A *in vacuo* or based on hypothetical facts which can only be determined at full trial. The crux of the Plaintiff's claims is that the defendants acted in concert to take over Ho Hup in breach of the Take-Over Code and the Securities Commission Act. These factual allegations in the amended statement of claim are vehemently denied by the defendants. Order 14A procedure cannot be invoked on the basis of assumed facts (as what has been done by the learned judicial commissioner). The O.14A procedure is not appropriate where there are conflicting allegations of facts. (see *Cycle Links Co Ltd v. Chevalier Construction (Hong Kong) Ltd* [2007] HKCU 400; *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; *Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd* [2007] 7 MLJ 385 and *William Singam a/l Raja Singam (suing as the public officer of Pertubuhan Kristian Thareeti Kudaram, Ipoh Perak) v. Meeriam Rosaline a/p Edward Paul & Ors* [2009] 7 MLJ 888);
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> (b) the above authorities clearly indicate that there was no question of 'assuming all the facts were true for the purpose of an O. 14A application'. The learned judicial commissioner should not made a determination under O. 14A based on assumed or hypothetical facts;
>
> (c) the O. 14A procedure in the present case does not dispose of a substantial part of the action and therefore they will not be any saving in cost and time. The learned judicial commissioner in his grounds of judgment accepted this principle. There will be no such saving as the same evidence will be led with respect to the remaining causes of action …

[15] In the case of *Director Of Forests, Sarawak & Anor v. Racha Urud & Ors And Other Appeals* [2017] 5 CLJ 389; [2017] 4 MLJ 42, the Federal Court (Arifin Zakaria CJ, Hasan Lah, Abu Samah Nordin, Azahar Mohamed and Balia Yusof Wahi FCJJ) held that:

> [35] On the applicability and the approach to be taken by the court in exercising its powers and discretion under O. 14A, we refer to the commentary of the O. 14A appearing in the Malaysian Court Practice (Practitioner Edition), a publication of the Malayan Law Journal at pp 125-127 which reads as follows:

[14A.1.3] Suitable question of law or construction

The question of law or construction must be suitable to be determined without the full trial of the action. The test of whether the question of law or construction is 'suitable' to be determined under this order is whether *all the necessary and material facts relating to the subject matter of the question* have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. *The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action.* (emphasis added)

[16] The following legal principles can be gleaned from the above-mentioned decisions of the appellate courts:

(i) a question of law is only suitable for determination under O. 14A if the point of law to be determined thereunder has been stated in clear and precise terms and the facts disclosed by the pleadings and affidavit evidence are sufficient for the court to make such determination which would be final as to the entire cause or matter or which would dispose a substantial part of the action;

(ii) where there are serious dispute of relevant facts involved which are material to the question of law, it is inappropriate and unsuitable to have recourse to an O. 14A procedure;

(iii) the court should not give a ruling under O. 14A *in vacuo* or based on hypothetical facts which can only be determined at full trial, as O. 14A procedure cannot be invoked on the basis of assumed facts; and

(iv) Order 14A determination of the question of law is a two-stage process which is comprised of:

(a) stage 1 – determination whether the proposed question of law is suitable for disposal under O. 14A; and

(b) stage 2 – determination of the question of law and making orders consequential to the outcome of the determination.

Stage 1: Suitability For O. 14A Determination

[17] By encl. 18, the defendant made an application under O. 14A of the ROC 2012 for the determination of the following question of law for disposal of the suit without the full trial of this suit:

Whether the Plaintiff has a cause of action and/or the right to claim compensation for the demolition of the subject matter telecommunications tower erected on forest reserved land, in view of the effect under the law – particularly the National Forestry Law 1984 – of a use permit that has lapsed and/or been cancelled.

[18] Relying on the facts which are undisputed or indisputable, the defendant submitted that the said question of law forms the central issue in the suit and goes to the *locus standi* or legal right of the plaintiff to seek the reliefs in this suit.

[19] In opposing the O. 14A application, the plaintiff contended that:

(i) the factual basis for the said question is seriously disputed in that the material facts relating to the subject matter are disputed; and

(ii) the said question will not dispose of substantial part of the action and therefore would not result in any saving in costs and time.

[20] In submitting that this is an appropriate case for O. 14A determination, the defendant contends that although the plaintiff has raised numerous factual allegations and disputes in its pleadings and in the O. 14A application the following critical facts which give rise to the said question are not disputed by the parties:

(i) The plaintiff erected the subject matter tower on the site, which forms part of Forest Reserve Land, under a use permit issued pursuant to the NFA in 22 November 2007 (the "use permit") by the Selangor State Forestry Department (Jabatan Perhutanan Negeri Selangor, or "JPNS").

(ii) Subsequently, the use permit expired and lapsed with effect from 1 January 2018 (the "lapse date"). The plaintiff received a confirmation of this *via* a letter issued by the JPNS dated 18 May 2018 (the "JPNS letter").

(iii) The tower was demolished after the lapsed date. The plaintiff then brought this suit against the defendant claiming compensation for the said demolition.

The defendant submitted that it is trite that the issues of *locus standi* and/or cause of action represent the fundamental question of whether a suit ought to have been brought in the first place. If the plaintiff has no *locus standi*, then it ought not to have brought this suit against the defendant – regardless of the merits of its other factual allegations.

[21] The defendant also relies on Gunalan J's judgment in *Caristra Holdings Sdn Bhd v. Projek Lintasan Sungai Besi - Ulu Klang Sdn Bhd*, Shah Alam High Court Suit No. BA-22NCvC-575-11-2018 wherein the learned judge held, on materially similar facts involving another use permit under Forestry Act in the same highway project involving demolition of a restaurant building after the expiry or cancellation of a use permit, that the suit was suitable for disposal under O. 14A of the ROC 2012 and after hearing the parties' submissions in Stage 2, the learned judge answered the similar question of law in the negative and dismissed the claim for compensation for loss of the restaurant on ground of lack of *locus standi* and/or absence of reasonable or plausible cause of action.

[22] After having considered the affidavit and submissions of the parties including Gunalan J's judgment in the *Caristra* Suit No. BA-22NCvC-575-11-2018 (*supra*), I find and hold that the present suit is appropriate and suitable for O. 14A disposal by determination of the said question of law. I find that the undisputed and/or indisputable facts as summarised in paras. 1 to 9 above and in paras. 20.1 to 20.3 of the defendant's written submissions in encl. 24 are sufficient for determination of the said question of law and that an answer to the said question of law would dispose of either the whole or a substantial part of this suit and can result in saving of costs and time.

Stage 2: Determination Of The Said Question Of Law And Making Consequential Orders

[23] The said question of law is:

> Whether the Plaintiff has a cause of action and/or the right to claim compensation for the demolition of the subject matter telecommunications tower erected on forest reserved land, in view of the effect under the law – particularly the National Forestry Law 1984 – of a use permit that has lapsed and/or been cancelled.

[24] In submitting that the said question of law should be answered in the affirmative, the plaintiff contends as follows:

(i) the plaintiff submits that the defendant failed to prove authority to demolish tower or to rely on NFA;

(ii) the plaintiff submits that it clearly has *locus standi* to maintain this suit;

(iii) the plaintiff submits that the ownership of the tower remained with the plaintiff;

(iv) the plaintiff submits that there were other factual disputes; and

(v) the plaintiff submits that *Caristra* suit (*supra*) with Gunalan J's judgment is wholly irrelevant to the plaintiff's suit herein.

[25] In submitting that the said question of law should be answered in the negative, the defendant contends as follows:

(i) the defendant submits that the plaintiff has strictly limited rights over the site under the use permit;

(ii) the defendant submits that with the lapse of the use permit the plaintiff has no *locus standi* and/or cause of action to claim compensation for the tower; and

(iii) the defendant submitted its rebuttals to the plaintiff's contentions.

[26] The NFA, which became law in Selangor by the National Forestry Act (Adoption) Enactment 1985 with effect from 2 June 1986, provides among others as follows:

A 17(1) On the determination of any licence, minor licence or Use Permit issued under this act or any previous forest law, there shall, subject to subsection (3), vest in the state authority all buildings on the land (by whomsoever erected) other than any of temporary construction and capable of removal.

B (2) Subject to subsection (3), no compensation should be payable by the State Authority in respect of any building vesting in it pursuant to this section.

(3) Subsections (1) and (2) shall have effect subject to any provision to the contrary in the licence or permit.

C 32(1) Subject to subsection (3), no person shall occupy or carry out any activity upon any land within a permanent reserved forest, unless he is the holder of a use permit.

(3) Subsection (1) shall not apply to the occupation of, or the carrying out of any activity upon, any land in a permanent reserved forest if such act or activity is:

D (a) the exercise of a right confirmed or the performance of a duty imposed by any licence, minor licence, entry permit or road permit; or

(b) authorised or required to be done under this Act.

E 36(1) Except in so far as it is otherwise prescribed, every Use Permit shall be issued for a term expiring not later than the end of the calendar year in which it commences, and subject to subsection (3), may be renewed from time to time.

(2) Every Use Permit shall have effect subject to such provisions as
F maybe contained therein and, so far as not inconsistent therewith, to any other provisions which may be prescribed.

(3) The Director may on the application of a holder of a Use Permit … renew the Use Permit for a term not more than one calendar year …

G 39. Any movable property brought upon the land covered by a use permit may be removed by the owner thereof during the term of the use permit, but if any movable property remains on such land for more than ninety days after the expiry or revocation of the permit, the Director may dispose of the property in such manner as he considers fit, and may recover from the owner thereof or the holder of the use permit such expenses as are incurred by him in disposing of such property.

H **[27]** In the letter of approval of use permit (exh. "AF2" to plaintiff's affidavit-in-reply in encl. 20), it was expressly stipulated, among others, that:

(1) The area of the Use Permit remains its status as permanent reserved forest [item (d) of Appendix 1 thereto];

I (2) The State Director of Forestry shall have the right to revoke the use permit at any time (item (q) of Appendix 1); and

(3) The permit order shall not claim any damages, compensation or any payment from the State Government or the Forestry Department for any action taken pursuant to any of the above-mentioned paragraphs (item (r) of Appendix 1 thereto).

[28] It is an undisputed fact that the plaintiff's last use permit expired on 1 January 2018.

[29] Under s. 27 of the NFA read with the National Forestry Act (Adoption) Enactment 1985, all immovable property at the land vested in the State Authority as from 1 January 2018, and the permit holder had 90 days within which to remove its movable properties, failing which the Director of Forestry Department could dispose of them in whatever manner he thinks fits and may recover from the previous permit holder the expenses of such disposal.

[30] Many months before the expiry of the use permit, the plaintiff already knew of the ongoing process of the preparation for use of the relevant parts of the permanent reserved forest for the purposes of construction and operation of a privatised expressway. As early as 27 September 2016, the plaintiff wrote a letter to the defendant regarding the proposed new site for the relocation of the telecommunication tower within the right-of-way of the expressway. The exh. "FZ5" of the defendant's affidavit-in-reply (encl. 21) is a copy of the plaintiff's letter dated 27 September 2016 to the general manager of the defendant, and it reads as follows:

Projek Penswastaan Lebuhraya Bertingkat Sungai Besi - Ulu Kelang (SUKE)

– Pengalihan menara telekomunikasi yang masih beroperasi di Hutan Simpan Bukit Sg Puteh

Dengan segala hormatnya, kami merujuk perkara di atas dan mesyuarat bersama wakil tuan (SUKE) berkaitan lokasi tapak menara telekomunikasi tersebut.

Sehubungan dengan itu, dilampirkan di sini pelan tapak cadangan untuk makluman dan rujukan pihak tuan. Pelan ini adalah hasil dari perbincangan antara pihak KJS, pihak Jururunding dan pihak SUKE pada 19hb September 2016.

Segala kerjasama pihak tuan amatlah dihargai dan sila berhubung dengan pihak kami jika terdapat sebarang pertanyaan.

The attached plan is intituled "Pelan Cadangan Mendirikan Struktur Telekomunikasi bagi Tujuan Menggantikan Struktur Menara Telekomunikasi Sediada" i.e Proposed Plan to Build a Telecommunication Structure for the Purpose of Replacing the Existing Telecommunication Tower.

[31] It is also an undisputed fact that the plaintiff did not remove the telecommunication tower or the equipment by the end of the 90-day period after the expiry of the last use permit.

[32] By letter dated 18 May 2018 (exh. "FZ4" to defendant's affidavit-in-reply, encl. 21; tab 3 of the core bundle (encl. 48), the State Director of Forestry wrote to notify the plaintiff that:

> a. the State Authority decided on 29.11.2017 to excise a part of Hutan Simpanan Bukit Sungai Puteh Selatan for the purpose of Privatised Sungai Besi - Ulu Kelang Elevated Expressway (SUKE);
>
> b. the State Forestry Department had decided not to renew the Use Permit and had therefore revoked the Use Permit ST/HS/1/2009/ PENGGUNAAN with effect from 1.1.2018;
>
> c. the Plaintiff was required to take speedy actions to remove whatever movable property which may belong to the Plaintiff from the Site within 90 days from the date of this letter; and
>
> d. if any movable property still remains at the site after 90 days, the Director would dispose of the same in whatever manner he thinks fit and can recover the expenses of removal from the Plaintiff.

[33] It is an undisputed fact that the plaintiff did not dismantle or remove the telecommunication tower or equipment from the site within 90 days after 18 May 2018.

[34] In para. 13.2 of the defendant's affidavit-in-reply (encl. 21), the defendant's deponent Mohd Fareez bin Zakir stated as follows:

> 13.2 Furthermore, by the time of the demolition, the Tower was no longer functioning as a telecommunications facility. This is because before the tower was demolished, the Defendant had contacted the various telcos and allowed them to decommission, dismantle and remove their telecommunications equipment from the Tower and Site (with the exception of one Telco that chose to abandon its equipment on the basis that they were obsolete). The dismantling of the equipment from the tower by the Telcos was documented in *inter alia* photographs taken at that time.
>
> Photographs showing the Telcos representatives dismantling their equipment from the Tower prior to the Tower's demolition are now shown to me and the copy thereof annexed hereto and marked collectively as Exhibit "FZ-6".
>
> The photographs in Exhibit "FZ-6" show workers from Sapura, U-mobile, Celcom, Maxis and YTL dismantling their telecommunication equipment from the Tower and the site.
>
> In the Plaintiff's affidavit and written submissions, there is nothing to rebut or dispute or contradict the fact averred to in paragraph 13.2 of the Defendant's Affidavit in Reply. However, the Defendant's counsel said in her oral clarification that for the purpose of O. 14A determination, the Defendant does not regard this point as material because the Plaintiff at this Stage 2 hearing seems to dispute the photographs. In the circumstances, this Court will not attach any relevance or weight to this point.

[35] It is a common fact that in early January 2019, the defendant dismantled and removed the tower from the site: para. 37 of the defendant's written submissions, para. 21 of the amended statement of claim; para. 6 of the statement of agreed facts.

[36] In our present case, the plaintiff has not filed any judicial review proceeding to challenge the validity of the State Director of the Forestry's revocation of the use permit with effect from 1 January 2018. Neither has the plaintiff included the State Director of Forestry as a party to this suit nor made any allegation to question the validity of revocation of the use permit. It is also pertinent to note that a person cannot mount a collateral attack against the validity of a public officer's exercise of a statutory powers by way of an ordinary civil suit, and such attack or challenge has to be by way of judicial review proceeding which include the relevant public officer as a party. Any collateral attack or circuitous attempt to challenge the validity of a public officer's decision would constitute an abuse of process and therefore liable to be struck out by the court. This was decided by the House of Lords in *O'Reilly v. Mackman* [1983] 2 AC 237. This principle has been accepted by our Federal Court in recent decisions.

> In the circumstances, this Court has to consider the said Question of Law on the basis that the Director's revocation of the Use Permit is valid and lawful.

[37] Under the provisions of the NFA read with the Selangor National Forestry Act (Adoption) Enactment 1985, upon the revocation of the use permit:

(i) all immovable properties on the reserved forest land become vested in the Director; and

(ii) movable properties on the reserved forest land are to be removed by the use permit holder within 90 days, failing which the Director can dispose of them in a manner he considers fit and recover the expenses of removal from the permit holder.

[38] As the NFA does not have a specific definition for "building" but uses a term "building" in s. 17(1) in contrast with the term "movable properties" in s. 39, it is my considered view that the word "building" in s. 17(1) is used synonymously with "immovable property" under the law of property or "land" as defined in the National Land Code.

[39] In para. 12.3 of the plaintiff's affidavit-in-reply (encl. 20), the plaintiff's deponent Mohd Farhan bin Ismail Hadi Tang affirmed that "the plaintiff's tower … is immovable property erected and maintained upon the site". In paras. 9.1(e) and 10.3(a) of the defendant's affidavit-in-reply (encl. 21), the defendant's deponent stated that the tower was vested with the State Authority pursuant to s. 17 of the NFA which provides for vesting of

A buildings. In the circumstances as shown in the affidavits exchanged between the parties, it is the common factual position between the parties that the tower was an immovable property.

[40] Under the National Land Code and law of property, immovable properties form part of the land, and the landowner also has ownership of
B the immovable properties on the land. Section 17(1) of the NFA also stipulates to the same effect that all buildings (synonymous with immovable properties) at the forest reserved land are vested in the State Authority upon the determination or expiry of any licence, minor licence or use permit. In the circumstances of our present suit, the ownership of the tower vested in
C the State Authority as from 1 January 2018.

[41] With the vesting of the tower in the State Authority on 1 January 2018, the plaintiff ceased to have any ownership claim or right to the tower as from 1 January 2018.

D **[42]** Put in another way, the central issue in the present suit is whether the plaintiff, who ceased to have his ownership right or claim to the tower as from 1 January 2018, has the legal right or *locus standi* to sue another person who subsequently demolished and dismantled the tower in early January 2019. In my considered view, the answer to this question is in the negative.
E Under the law of property, any suit or action to claim against person for damages for destruction or demolition of an immovable property can only be instituted and maintained by the prevailing owner of the immovable property at the time of the destruction or demolition, and not by the previous owners who have ceased to have ownership right or claim to the immovable property prior to the date of destruction or demolition.

F **[43]** In coming to the above conclusion, the court also find support from *Mohamed Said v. Fatimah* [1962] 1 LNS 101; [1962] 1 MLJ 328 where Adams J held that the appellant had no cause of action at the time of issuance of the writ because his temporary occupation licence expired as at the date
G of issuance of the writ, although the appellant subsequently renewed the temporary occupation licence.

[44] As a consequence, this court answers the said question of law in the negative.

[45] Even if one were to approach the matter from the perspective of
H treating the tower as movable property, the answer to the said question of law in the circumstances of the undisputed and/or indisputable facts of the present suit is still in the negative.

[46] Under the common law, the landowner has to give the ex-lessee or ex-tenant or ex-licensee a reasonable time after the expiry of the lease or tenancy
I or licence the opportunity for the removal of the latter's movable properties from the land or premises. If the ex-lessee, ex-tenant or ex-licensee fails or

neglects to avail himself of the reasonable opportunity, the landowner is entitled to remove and dispose of such movable properties from the land and premises. Under the common law, what is reasonable time depends on the facts and circumstances of each particular case.

[47] Under s. 39 of the NFA read with the Selangor National Forestry Act (Adoption) Enactment 1985, the permit holder is allowed 90 days from the date of expiry of the use permit to remove the movable property from the land, failing which the Director may dispose the property in such manner as he considers fits. Section 39 lays down the statutory time limit of 90 days for the permit holder to remove his movable property, if he so wishes. As the time frame is fixed by statute, it is irrelevant and unnecessary to consider what should be the reasonable period of time for carrying out such removal.

[48] On the facts of the present suit:

(i) the plaintiff failed or neglected to remove the tower within 90 days from 1 January 2018 (the date of expiry of the use permit);

(ii) the plaintiff further failed or neglected to remove the tower within 90 days from 18 May 2018 (the date of the Director's letter in exh. "FZ4");

(iii) such reported failures and neglects were in spite of the fact that as early as 27 September 2016 the plaintiff knew of the need to relocate the telecommunication tower for the purpose of the SUKE expressway: see exh. "FZ5"; and

(iv) eventually, in early January 2019, the defendant demolished and removed the tower.

In light of the above-mentioned events, there is no valid basis for the plaintiff to complain about the deprivation of reasonable opportunity for the plaintiff to dismantle and remove the tower from the site.

[49] It is trite that after the expiry of the licence or permit for using or occupying a land, the previous licensee or permit holder has no right to insist that his movable properties shall be left intact at the land for a prolonged or indefinite period of time. Here, s. 39 of the NFA prescribes a statutory period of 90 days for such removal of movable property, if the previous licensee or permit holder wishes to do so.

[50] In arriving at the conclusion that the answer to the said question of law is in the negative, this court also finds reinforcement from the following decided authorities:

(i) Gunalan J's judgment in *Caristra Holdings Sdn Bhd v. Projek Lintasan Sungai Besi - Ulu Kelang Sdn Bhd* in Shah Alam High Court Suit No. BA-22NCvC-575-11-2018, where His Lordship answered the same question, in a case with materially similar facts and involving the same SUKE expressway, in the negative; and

(ii) *Papoo v. Veeriah* [1959] 1 LNS 70; [1965] 1 MLJ 127 where Good J held that if the holder of a temporary occupation licence chooses to put up the building on the State land, he takes the risks of losing what he has put into that building as such building is clearly a property of the State. As submitted by the defendant's counsel, the use permit under the NFA is akin to temporary occupation licence under the National Land Code. Indeed ss. 17 and 39 of the NFA provides for the same consequences for licence and use permit in the event of determination or expiry of the licence and use permit.

[51] The plaintiff's argument that the defendants has not established that it had authority to demolish the tower is a misconceived and irrelevant argument for the purpose of the said question of law. The said question concerns that the plaintiff's *locus standi* to bring this suit and to claim compensation for the tower. As explained in paras. 37 to 44 above, the demolition of the tower was carried out at a time which was about 12 months after the tower became vested in the State Authority and the plaintiff had ceased to have his ownership right to the tower, and therefore, the plaintiff has no *locus standi* or legal right to bring this suit or claim compensation against the defendant. The separate question whether or not the State Authority as the legal entity vested with the ownership of the tower at the time of demolition has in fact authorised the defendant's demolition and removal of the tower is *res inter alios* and would only become a relevant issue if the State Authority brings a suit against the defendant.

[52] The plaintiff cited *Clerk & Lindsell on Torts* (22nd edn, 2018), para. 19- 40 and *Peacock v. Custins* [2002] 1 WLR 1815 (English Court of Appeal) which stated the principle that the user of a way in excess of right granted to him will render him a trespasser. These authorities are not relevant to the question of the *locus standi* of the plaintiff who brings the suit. Where the plaintiff has no *locus standi* to sue for compensation, the question whether or not the defendant has committed a trespass *vis-à-vis* a third person is *res inter alios*. It is only if the plaintiff has the *locus standi* to sue that the question of the limit of authority and whether the defendant has acted in excess of authority would become a relevant question. *Locus standi* is a fundamental threshold which a plaintiff has to cross before the other issues on the merits and demerits of the case would become relevant and necessary for decision by the court. Further, the gist of *jus tertii* is that if a defendant obtained or derived his right to enter or occupy a land from a plaintiff and the plaintiff sues the defendant for trespass after the expiry of the licence or permit, the defendant cannot set up a defence that the plaintiff has no title or right to the land but that another third person has such title or right to the land – *jus tertii* applies in such a case. In our present case, it is an undisputed fact that the defendant here did not obtain or derive the right to construct the SUKE expressway from the plaintiff. As such, *jus tertii* has no application to the facts of our present case.

[53] In arguing that the defendant is essentially seeking to set up a defence of *jus tertii* and that *jus tertii* cannot be a defence to trespass action unless it can be shown that the defendant acted with the true owner's authority, the plaintiff cited in support thereof *Clerk & Lindsell on Torts* (22nd edn, 2018), para. 19-18; *Winfield & Jolowicz, Torts* (18th edn, 2010), p. 688; *Nicholls v. Ely Beet Sugar Factory* [1931] 2 Ch 84 at p. 86; *Wong See Kui v. Hong Hin Tin Mining Company* [1969] 1 LNS 202; [1969] 2 MLJ 234; and *Govindaraju v. Krishnan* [1962] 1 LNS 46; [1962] 1 MLJ 334 at p. 335. In the cases relied on by the plaintiff, the plaintiffs who were claiming damages for trespass in those cases claimed possession of structures which they owned on the land or based a valid licence to the land at the date of the alleged trespass. In the case of *Nicholls v. Ely Beet Sugar Factory* (*supra*), the plaintiff owned fisheries on, as well as a lease to, the land in question. In the case of *Wong See Kui v. Hong Hin Tin Mining Company* (*supra*), the plaintiff held a temporary occupation licence ("TOL") to the land in question. In the case of *Govindaraju v. Krishnan* (*supra*), the plaintiff owned the premises on the land and held a TOL to the same. The authorities relied by the plaintiff are therefore distinguishable from the present case. Moreover, the gist of *jus tertii* is that if a defendant obtained or derived his right to enter or occupy a land from a plaintiff and the plaintiff sues the defendant for trespass after the expiry of the licence or permit, the defendant cannot set up a defence that the plaintiff has no title or right to the land but that another third person has such title or right to the land – *jus tertii* applies in such a case. In our present case, it is an undisputed fact that the defendant here did not obtain or derive the right to construct the SUKE expressway from the plaintiff. As such, *jus tertii* has no application to the facts of our present case.

[54] In our present suit, the NFA expressly forbids any person from occupying or carrying out any activity at any forest reserved land, unless the person holds a use permit: see s. 32. More significantly, upon the lapse or expiry of the use permit on 1 January 2018, the plaintiff lost its licence to occupy and carry out any activity on the site. Indeed, pursuant to the clear provisions of the NFA, the plaintiff is expressly forbidden from continuing to occupy the site after the lapse date. There is therefore no expectation of continued possession or undisturbed enjoyment to the site after 1 January 2018. Moreover, the tower – based upon which the plaintiff may have attempted to argue possession of the site – had vested in the State Authority as from 1 January 2018. As a consequence of the above, at the time of the tower's demolition, the plaintiff had:

(i) no licence to occupy the site; and

(ii) no ownership of the tower.

As such, the plaintiff has no *locus standi* or legal right to maintain the present suit for the value of the tower or the loss of alleged incomes to be derived from the use of the tower at the site.

[55] In para. 4.2 of the plaintiff's written submissions (encl. 23), the plaintiff has attempted to doubt the defendant's entity as the concessionaire for SUKE expressway and the defendant's right of way over the land on which the tower sat. The undisputed and/or indisputable facts adduced in the affidavits and exhibits show that (i) in September 2016, the plaintiff's Head of Asset Management Department wrote to the defendant's General Manager whereby the plaintiff proposed a new site for relocation of the tower at SUKE expressway project and this was agreed in principle by the defendant: see exh. "FZ5" to the defendant's affidavit-in-reply (encl. 21) and exh. "AF4" to plaintiff's affidavit-in-reply (encl. 22); (ii) in paras. 8 to 8.5 of the amended statement of claim, the plaintiff specifically pleaded the negotiation in 2017 and 2018 between the plaintiff and the defendant regarding the possibility of compensation for relocation of the tower at SUKE project site, but the negotiations failed to reach a mutually acceptable settlement: see paras. 6.4 to 6.4.3.5 of the statement of defence and counterclaim. By the plaintiff's such acts, the plaintiff has by conduct recognised the defendant as a concessionaire of SUKE expressway and/or as the entity having right of way over the land on which the tower sat. In the circumstances, the plaintiff cannot approbate and reprobate: see Federal Court's decision in *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297 at p. 323; also per Richard Malanjum JCA (later CJ) in *Visage Continental Sdn Bhd v. Smooth Track Sdn Bhd* [2007] 6 CLJ 570 at p. 581. In the premises, I find it untenable that the plaintiff could dispute the defendant as the concessionaire of SUKE expressway or as having the right of way in the present suit after having by its past conduct recognised the defendant as the concessionaire of SUKE expressway or having the right of way.

[56] Another argument of the plaintiff is that the defendant has not proved that the defendant had been authorised by the State Authority or the State Director of Forestry to demolish the tower. Citing *Majlis Bandaraya Shah Alam v. Only One Foot Reflexology Sdn Bhd* [2017] 7 CLJ 557; [2018] 1 MLJ 528, the plaintiff contended that the defendant has not proved its delegated authority under NFA from the State Authority or the State Director of Forestry to demolish the tower. I find the plaintiff's said argument to be irrelevant to the said question of law: see paras. 36 to 44 above. Once it is established that the plaintiff has no ownership right or claim to the tower, the plaintiff has no *locus standi* or legal right to bring this suit against the defendant for demolition of the tower. The separate question whether or not the demolition was done lawfully or has caused any actionable loss to the owner of the tower is a question to be decided in a suit by the owner (ie, the State Authority) against the defendant ie, *res inter alios*. Moreover, in putting forward such argument, the plaintiff also overlooked the fact that the part of the permanent reserved forest including the site of the tower was excised from the permanent reserved forest in favour of the SUKE expressway with effect from 29 November 2017: see para. 2 of the State Director of Forestry's

letter dated 18 May 2018 in exh. "FZ4" to the defendant's affidavit-in-reply (encl. 21). With such excise of the land from the permanent forest reserve in favour of SUKE expressway months before the January 2019 demolition of the tower, the question of authorisation from the State Authority or the State Director of Forestry did not arise as at the date of demolition in January 2019. Further, I accept the defendant's submission that the case *Majlis Bandaraya Shah Alam v. Only One Foot Reflexology Sdn Bhd* (*supra*) can be distinguished on the facts, in that:

(i) In that case, the by-law expressly prescribes the method of enforcement and the person/body authorised to carry out the enforcement. In contrast in the present case, the NFA does not prescribe or restrict the person/body who may demolish any building that has vested in the State Authority under the Act.

(ii) Furthermore, the case was brought by a healthcare and beauty centre whose premises was raided by the officers of the defendant/appellant. The healthcare and beauty centre was therefore indeed the proper plaintiff and no *locus standi* issue arose there – unlike our present case here.

(iii) A distinction should be drawn between the penal enforcement of statutory powers of raid and seizure of premises in *Majlis Bandaraya Shah Alam v. Only One Foot Reflexology Sdn Bhd* case and the statutory civil remedy under s. 39 of the NFA in the event of the permit holder's failure to remove his movable property from the forest reserve after the expiry of the use permit in our present case.

[57] In arguing that the plaintiff has *locus standi* to maintain the action herein, the plaintiff relies on (i) its contention that trespass is actionable at the suit of a person in possession of the land, without the need to show title, citing *Clerk & Lindsell on Torts* (22nd edn, 2018) para. 19-18; (ii) its contention that under s. 8 of the Specific Relief Act 1950 there was the right of claim based on dispossession of immovable property regardless of title, citing the case of *SME Aerospace Sdn Bhd v. Steyr Mannlicher (M) Sdn Bhd* [2006] 5 CLJ 121; and (iii) its contention that the defendant's demolition of the tower is in contravention of s. 235 of the CMA.

[58] On the first contention regarding trespass, I have rejected the plaintiff's said contention for reasons stated in paras. 37 to 54 above. Moreover, the use permit of the plaintiff expired on 1 January 2018, and the part of the reserved forest including the site of the tower was already excised from the reserved forest in favour of the SUKE expressway, the plaintiff was no longer in physical possession of the tower as at early January 2019, the date of demolition.

[59] In my considered view, the plaintiff cannot rely upon s. 7 of the Specific Relief Act 1950 to found or maintain this suit. Section 7 of the Specific Relief Act 1950 provides recovery of possession of specific immovable property. The immovable property in this suit, the tower had vested in the State Authority as from 1 January 2018 and was demolished by the defendant in January 2019. There is now no immovable property in existence which can be the subject matter of recovery of possession. Further, I agree with the defendant's submission that to be entitled to the relief under s. 8(1) of the Specific Relief Act 1950 the case must fall within the situation set out in s. 7(2), and that s. 7(2) only applies to a landlord-tenant relationship. This submission of the defendant is well supported by various decided authorities including the Court of Appeal's decisions in *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; [2009] 6 MLJ 1 and *MHM Trend Station Sdn Bhd & Ors v. Petronas Dagangan Bhd* [2009] 1 LNS 437; [2011] 4 MLJ 95 and the High Court's decisions in *Wan Shahriman Wan Suleiman v. Esso Malaysia Bhd* [2011] 1 LNS 1173; [2012] 8 MLJ 29 and *SME Aerospace Sdn Bhd v. Steyr Mannlicher (M) Sdn Bhd* [2006] 5 CLJ 121 at p. 127. In this suit here, there is no landlord-tenant relationship between the State Director of Forestry and the plaintiff, and there is also no such landlord-tenant relationship between the plaintiff and the defendant here.

[60] The plaintiff argues that the defendant's demolition was in contravention of s. 235 of the CMA which provides as follows:

> 235 Damage to network facilities etc
>
> A person who, by any wilful dishonest or negligent act or omission, extends, tampers with, adjusts, alters, removes, destroys or damages any network facilities or any part of them commits an offence …

Closely connected therewith is another argument of the plaintiff that the ownership of the tower remained with the plaintiff by virtue of ss. 126 and 271 of the CMA which provides as follows:

> **126 Licensing of network facilities, network services and applications services**
>
> (i) Subject to such exemptions as may be determined by the Minister by order published in the *Gazette*, no person shall:
>
> (a) own or provide any network facilities;
>
> (b) provide any network services; or
>
> (c) provide any applications services,
>
> except under and in accordance with the terms and conditions of:

(aa) a valid individual licence granted under this Act; or

(bb) a class licence granted under this Act,

expressly authorising the ownership or provision of the facilities or services

271. If there is any inconsistency or conflict between this Act and any other relevant written law, the provisions of this Act shall prevail to the extent of the inconsistency or conflict.

[61] The combined effect of the plaintiff said arguments are as follows:

(i) if a telecommunication network provider has rented or been given licence to use a land for building and operating a telecommunication tower (ie, network facility) for a fixed period of time, then after the telecommunication tower has been erected the landlord or proprietor cannot thereafter demolish or remove the tower indefinitely in spite of the expiry of the tenancy or licence; and

(ii) if a telecommunication tower has been built on a land which has been rented or granted licence to a telecommunication provider, thereafter the ownership of the telecommunication tower built on the land would forever remain with the licensed telecommunication network provider who built it notwithstanding the expiry of the tenancy or licence.

We shall now examine whether or not the said arguments of the plaintiff are correct in law.

[62] Under the law of property, it is a settled principle that a tenant or licensee who overstays at the land after the expiry of the tenancy or licence is a trespasser. Under art. 13(2) of our Federal Constitution, no law shall provide for the compulsory acquisition or use of the property without adequate compensation. Implicit in art. 13(2) is that no property owner can be compelled to allow his property to be used by another person without the property owner's consent or agreement unless it is through compulsory use by written law, and any such written law on compulsory use of property without the property owner's consent shall also provide for adequate compensation for such compulsory use. Article 4(1) provides that "This constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void".

[63] In my considered view, s. 235 of the CMA merely protects the network facilities from wrongful acts or omissions which have the effect of altering or tampering with the network facilities so as to operate them in a manner or extent unauthorised by the Commission and also from wrongful acts of mischief which have the effect of destroying, damaging or interfering with the lawful operation of the network facilities. Implicit in s. 235 is that the network facilities have been duly licensed by the Commission and are

lawfully erected and continued at the land with the consent or agreement of the landowner. It is not the intent or purpose of s. 235 to deprive any landowner of his/her proprietary rights after the expiry of the lease, tenancy or permit previously granted to the network provider who erected the network facilities on the landowner's land. Similarly, s. 235 is not intended to empower the network provider to compel a landowner to let the network provider continue to use the land for operating the network facilities without the landowner's consent or agreement after the expiry of the previous lease, tenancy or licence or permit. I cannot find any express words in s. 235 of CMA which can be interpreted to that effect according to their natural and ordinary meaning. Even if there were express words in a statute which purport to provide to the combined effect of the plaintiff's arguments as argued in para. 60 and analysed in para. 61 above, such statute would be inconsistent with art. 13(2) of the Federal Constitution and therefore void to the extent of such inconsistency.

[64] Statutory protection of similar nature to utility equipment or property is also provided to other utilities. Section 37(1) of the Electricity Supply Act 1990 provides that "Any person who tampers with or adjusts any installation or part thereof … so as to cause as to be likely to cause injury any equipment or other property commits an offence …". Section 37(2) of the Electricity Supply Act 1990 provides that "Any person who by any rash or negligent act or omission causes damage to any … property in respect of any installation or equipment or part thereof commits an offence …". Section 37(11) of the Electricity Supply Act 1990 provides that "Any person who wilfully or negligently – (b) breaks, throws down, causes to fall or damages any supply line, post pole or other equipment, installation or any part thereof, as the case maybe, connected with the supply of electricity commits an offence …". These similar provisions do not empower a utility provider to compulsorily use a private landowner's property without the landowner's consent. In fact, ss. 13 and 16 of the Electricity Supply Act 1990 when expressly empowers compulsory use of land for electrical installation also expressly provides for reasonable compensation to be paid to the landowner and other persons thereby affected. In contrast, the CMA by ss. 126 and 235 do not empower any compulsory use of land without the landowner's consent or agreement. Section 125 of the Water Services Industry Act 2006 provides that "A person who tampers with any pipe, channel, conduct or structure, sewer, manhole, chamber, fixture and equipment … or any part of a water supply system or sewerage system commits an offence …". This section does not empower a water service provider to compulsorily use a landowner's land without the landowner's consent and without fair compensation. In fact, where the Water Services Industry Act 2006 by s. 141 provides for compulsory use of private land without the landowner's

consent, the section also expressly provides for a specific procedure and for full compensation to be paid by the utility licensee to the landowner and all other persons interested.

[65] Interpreting ss. 126, 235 and 271 of the CMA in light of art. 13 of the Federal Constitution, I hold that:

(i) Where a telecommunication network provider has rented or been given licence to use a land for building or operating a telecommunication tower (ie, network facility) for a fixed period of time, then after the telecommunication tower has been erected the landlord or the proprietor may thereafter demolish or remove the tower after lapse of reasonable time from the date of expiry of the tenancy or licence and after giving reasonable notice to the telecommunication network provider and other interested persons.

(ii) Where a telecommunication tower has been built on a land which has been rented or granted licence to a telecommunication network provider, thereafter the ownership of the telecommunication tower built on the land cannot forever remain with the licensed telecommunication network provider who built it notwithstanding the expiry of the tenancy or licence. It depends on the facts of each particular case whether, and if so, when the ownership of the tower has passed to or become vested in another person.

(iii) Where the telecommunication tower was erected on a permanent reserve forest land pursuant to a use permit issued under the NFA or the State Enactment which adapted the 1984 Act, the telecommunication tower, if it constitutes building or immovable property, vests in the State Authority upon the expiry of the use permit (s. 17) or if the tower constitutes a movable property, it remains the movable property of the network provider who is also under a statutory duty to remove the same within 90 days from the date of the expiry of the use permit, failing which the movable property would be disposed of by the State Director of Forestry or any person acting on his behalf or by a person who, after the expiry of the use permit, takes over the possession of the relevant land (s. 39).

[66] There are also some other miscellaneous issues raised by the plaintiff in its submissions. However, I find these other miscellaneous issues to be immaterial to and/or unnecessary for the determination of the said question of law on *locus standi* and/or legal right to sue. As correctly submitted by the defendant's counsel, "it is not the case that there must be no factual disputes at all – which is an impossibility in a civil dispute. Instead, all that is required is that the facts relevant to the O. 14A application must be undisputed and sufficient from the pleadings and affidavit evidence for the court to make a determination which would be final as to the matter". An

A average litigation counsel would be able to raise numerous issues or alleged issues to oppose an application under O. 14, O. 14A, O. 18 r. 19 or similar order on summary powers of the court. If the court were to accept the issues or alleged issues raised on their face value without assessing their materiality or necessity to the decision on the central or determinative main issue in the
B case, all the provisions of O. 14, O. 14A, O. 18 r. 19 or similar order on summary powers of the court would either be rendered defunct and useless, or the court would be excessively bogged down with the detailed analysis of such immaterial and/or unnecessary issues or alleged issues.

Conclusion In Respect Of Plaintiff's Action

C

[67] In conclusion, I hold that the said question of law should be answered in the negative. I hold that the plaintiff has no cause of action or the right to claim compensation for the demolition of the telecommunications tower erected on the forest reserved land, in view of the effect under the law – particularly the NFA – of a use permit that has lapsed and/or been cancelled.

D

[68] Accordingly, the plaintiff's action is dismissed with costs. The plaintiff shall pay the defendant's costs RM20,000, subject to allocator.

Question Of Law Relating To The Defendant's Counterclaims

E **[69]** In the course of the Stage 2 hearings of the defendant's O. 14A application in encl. 18, I also find that ancillary to the defendant's O. 14A application, it is also suitable and appropriate for the following second question of law to be determined without a full trial of the counterclaim action and that such determination will finally determine the entire cause or matter or a substantial part thereof:

F

> In view of the Court's determination of the said Question of Law posed by the Defendant, whether the Defendant's counterclaim discloses any reasonable cause of action for damages or compensation against the Plaintiff.

G **[70]** On 28 May 2020, I made an ancillary or related order that the above-mentioned second question of law be determined by O. 14A procedure. I made this O. 14A determination of the second question of law pursuant to O. 14A r. 1(1) which provides *inter alia* that "The court may … of its own motion, determine any question of law …". Liberty was given to both parties to file and serve written submissions which the parties may wish to file or
H serve, and the Stage 2 hearing of the second question of law was set down for hearing on a date suitable to both parties.

I